

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 418 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

and

Hon'ble MR.JUSTICE H.K.RATHOD sd/-

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements? No
2. To be referred to the Reporter or not? Yes
3. Whether Their Lordships wish to see the fair copy No:
of the judgement?
4. Whether this case involves a substantial question No :
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? No :

OIL & NATURAL GAS COMMISSION

Versus

M B PATEL & CO.

Appearance:

MR BR SHAH for Petitioner

MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

and

MR.JUSTICE H. K. RATHOD,

Date of decision: 11/07/2000

C.A.V. JUDGEMENT

(Per : D.C.Srivastava, J.)

1. This is an Appeal against the Judgment and Decree dated 30.9.1985 of Civil Judge (SD), Vadodara, making the Award submitted by the Umpire as Rule of the Court and directing the Decree to be drawn in terms of the Award together with interest at the rate of 6 % p.a. from the date of Decree till realisation.

2. Brief facts giving rise to this Appeal are as under :

The appellant Oil & Natural Gas Commission (for short "ONGC") invited tenders for reconditioning work of Ankleshwar Koyali Crude Oil Pipeline and Ankleshwar - Vadodara Gas Pipelines. After negotiation the tender of the respondent was accepted and he was telegraphically informed. A letter was also issued on 10th December 1982. Agreement was entered into between the parties and the terms of Agreement were reduced in writing which were signed by both the parties. There were various terms of contract for achieving minimum progress of work and in case of default provision for penalty was provided. It was the responsibility of ONGC to supply materials and cement free of cost to the contractor. Initially these materials were supplied to the contractor, but the progress was very slow, with the result that the ONGC could not achieve minimum progress of work. The ONGC placed order for material with one Agency which had gone in liquidation thereafter. Consequently fresh supply order was placed with other agency and in this process supply of material was delayed. The contractor was requested to suspend further work for some time. The ONGC made alternative arrangement and asked the contractor to come for negotiation, but the contractor did not turn up. When fresh material was received by the ONGC, the contractor was intimated but he refused to carry out the remaining work and claimed compensation. In this way dispute was raised by the contractor. Under the terms of the contract the disputes raised by the contractor were referred to two Arbitrators, who could not come to unanimous conclusion. Consequently an Umpire was appointed with the consent of both the parties. Shri V.M.Patel was appointed as Umpire. He signed the Award on 3rd Mayy 1985 which was filed in Court under Section 14 of the Arbitration Act. Thereafter notices were issued. The ONGC filed objection for setting aside the Award whereas the contractor filed reply requesting for dismissal of the objection and making the Award Rule of the Court.

3. The Court below, after considering the material

on record, found the Award to be perfectly in order. Consequently the objections of the ONGC were turned down and the Award was made Rule of the Court, hence this Appeal.

4. Learned Counsel for the parties were heard at length and the terms of the Agreement were examined so also the cases cited by the learned Counsel for the parties.

5. Shri A.R.Mehta, learned Counsel, challenged the impugned judgment of the lower Court only on three grounds.

6. The first contention of Shri Mehta was that the Umpire was in obvious error in granting consolidated Award especially when the claim of the contractor was head-wise. His argument has been that the Umpire should have given Award on each claim set-forth by the contractor and the lumpsum Award is unintelligible hence not sustainable. His second objection has been that under the Agreement the amount claimed by the contractor could not be granted so also the interest, for which reference has been made to clauses (14) and (18) of the Arbitration Agreement.

7. As against this, the learned Counsel for the respondent contended that the Arbitrator was not required to give reasoned Award and this Court will not sit as a Court of Appeal over the Award rendered by the Umpire nor the Court below could have sat as the Court of Appeal to scrutinise the Award on merits.

8. We find force in the contention of the learned Counsel for the respondent that the Court cannot examine the correctness of Award on merits. The Apex Court in PURI CONSTRUCTION PVT. LTD. v/S. UNION OF INDIA, reported in AIR 1989 SC 777 has laid down that "when a Court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Act, and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits."

9. When the parties have agreed to appoint Arbitrator or Umpire it will be deemed that they have chosen forum of their choice and they are bound by the Award rendered by the Arbitrators or the umpire. Unless, misconduct of the Arbitrator or Umpire is proved the award cannot be questioned or set aside. Misconduct may be of two kinds, procedural misconduct and personal

misconduct. Unless there is allegation of either of these categories of misconducts and the allegations are proved the Award cannot be set aside. It cannot be set aside on the ground that the Award does not stand on merit or does not appear to be correct.

10. We also find force in the contention of the learned Counsel for the respondent that no speaking Award is not bad in the eyes of law. The Apex Court in GUJARAT WATER SUPPLY & SEWERAGE BOARD v/s. UNIQUE ERECTORS (GUJARAT) (P) LTD., reported in AIR 1989 SC 973 has categorically held that ..."Non-speaking Award is not bad and the Arbitrator is not obliged to give reasons for his decision." It has been held that there is a trend in modern times that reasons should be stated in the award though the question whether the reasons are necessary in ordinary arbitration awards between the parties is pending adjudication by the Constitution Bench of the Apex Court. Even however, if it be held that it is obligatory for the arbitrator to state reasons, it is not obligatory to give any detailed judgment. An award of arbitrator should be read reasonably as a whole to find out the implication and the meaning thereof. Short intelligible indications of the grounds should be discernible to find out the mind of the arbitrator for his action even if it be enjoined that in all cases of award by an arbitrator reasons have to be stated. The reasons should not only be intelligible but should also deal either expressly or impliedly with the substantial points that have been raised. Sufficiency of the reasons depends upon the facts and the circumstances of the case. The Apex Court observed that the Court, however, does not sit in Appeal over the Award and review the reasons.

11. In this background the contention of Shri Mehta that consolidated Award giving lumpsum amount to the contractor is bad in eyes of law has to be examined. There is no dispute that if the Award is un-reasoned Award it automatically does not become invalid, but if we examine the claim of the contractor prima-facie it is found that it was pressed under six heads. The contractor claimed Rs.30,425/- for abandonment of contract. This was first claim. the second claim was for Rs.30,213/- for illegal deductions made by the ONGC. The third claim was for Rs.2,00,000/- for not supplying the material in time by the ONGC - appellant. The 4th claim was loss occasioned by the cocontractor for keeping his establishment alive and on this head the claim was for Rs.3,50,000/-. The 5th claim was loss of profit at the rate of 20 per cent amounting to Rs.1,80,000/- and the last was interest at the rate of 18 % p.a. As

against this lumpsum Award of Rs.5,98,438/- was rendered by the Umpire and we are unable to find out from the plain reading of the Award whether Umpire awarded each claim totally or refused any of the claims or allowed each claim partly. Of course, detailed reasons need not have been given by the Arbitrator, but he should have stated in the Award that under each of the six claims he is awarding certain specified amount and he should not have given reasons for reducing the amount. The fact remained that the total claim set-up by the contractor was not awarded by the Umpire and in these circumstances lumpsum award becomes unintelligible, and is hit by the observations of the Apex Court in Gujarat Water Supply and Sewerage Board v/s. Unique Erectors (Supra), where the Apex Court emphasised that short intelligible indications of the grounds should be discernible to find out the mind of the arbitrator for his action even if it be enjoined that in all cases of award by an arbitrator reasons have to be stated. Thus, the first objection of the learned Counsel for the appellant has to be sustained and is hereby sustained.

12. Then remains the remaining two objections, namely, Award of interest and Award of claim set-forth by the contractor.

13. The contention of Shri Mehta has been that under clauses (14) and (18) of the Arbitration Act the Arbitrator could not have awarded either compensation or interest, and since the Arbitrator has over-looked the clauses 14 & 18 of the Arbitration Agreement, he will be deemed to have misconducted with the proceeding. Of course, personal misconduct was not alleged or argued in the course of argument against the Umpire. It was further argued that in these circumstances, the Arbitrator had no jurisdiction to Award interest and compensation.

14. Section 30 of the Arbitration Act provides that the Award shall not be set aside except on one or more of the following grounds :

- (a) that an arbitrator or umpire has misconducted himself or the proceedings;
- (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;
- (c) that an award has been improperly procured or is otherwise invalid.

Sections 30(b) & (c) are not applicable in the instant case. From the arguments of Shri Mehta it appears that his contention is based on Section 30(a) of the Arbitration Act that the umpire has misconducted with the proceedings inasmuch as he did not look into clauses 14 & 18 of the Arbitration Agreement and has rendered the Award ignoring these two clauses in the Agreement which was duly signed by the contractor as well as by the officers authorised by the appellant. He further contended that the umpire had no jurisdiction, in these circumstances, to render and sign the Award. In support of his contention he has referred to the Apex Court Judgment in GRID CORPORATION OF ORISSA LTD. V/S. BALASORE TECHNICAL SCHOOL, reported in AIR 1999 SC 2262 where the Apex Court has laid down that Arbitrator deciding question otherwise than in accordance with contract commits jurisdictional error and in such circumstances the Court can interfere with the Award and can set aside the same.

15. In reply to this Argument learned Counsel for the respondent contended that the question that the arbitrator had no jurisdiction to decide the claim should have been raised as preliminary issue before the Umpire or the Arbitrator and since this was not done this plea cannot be permitted to be raised at this stage. He also contended that proper course for the appellant was to move an application under Section 33 of the Arbitration Act, 1940.

16. Section 33 of the Arbitration Act, 1940, provides that Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an Award or to have the effect of either determined shall apply to the Court and the court shall decide the question on affidavits. This section, to our mind, is not applicable on the facts and circumstances of the case because the appellant is not challenging the existence or validity of the Arbitration Agreement. Even the contractor respondent is not challenging the existence and validity of the Arbitration Agreement. Both the parties, after fully understanding the written agreement, signed the same. Consequently there can be no occasion for the parties to challenge the existence or validity of the Arbitration Agreement. The effect of the Arbitration Agreement which is not challenged by the appellant is also not to be determined on the motion of the appellant. Consequently Section 33, to our mind, is not applicable to the facts and circumstances of the present case.

17. The plea of want of jurisdiction of umpire which goes at the root of the matter can be raised at any stage, including the Appeal.

18. The next contention of Shri Mehta has been that the Umpire has not considered clause (14) of the Arbitration Agreement rather it was overlooked by him. Clause 14 of the Agreement is reproduced hereunder :

"14. DELAY IN CONSTRUCTION (COMMISSION'S DEFAULTS) :

The Commission will make every reasonable effort to furnish the materials required under the contract and the right of user including the permits required to be furnished by the Commission under the Contract in due time so as not to delay the construction related work of reconditioning. In case of any hold up to site work of the CONTRACTOR on account of non-availability of any one of these items, no Compensation by way of claims is admissible but only corresponding extension of time limit would be granted."

19. It is clear from the plain reading of clause (14) of the Arbitration Agreement that in case of any hold up to site work of the contractor on account of non-availability of any one of these items mentioned in this clause no compensation by way of claim is admissible, but only corresponding extension of time limit would be granted. Shri Mehta has emphasised upon this clause and argued that if the ONGC failed to supply material free of cost to the contractor within time, the contractor was entitled to seek extension of time for completing the work and not that he is entitled to compensation. He further argued that the words "No compensation by way of claim" is admissible but only extension of time limit could be granted, would amply indicate that compensation on any count whatsoever is not to be granted or allowed to the contractor and that he is entitled only to the extension of time.

20. Learned Counsel for the respondent argued that extensions were granted on 2 to 3 occasions, but subsequently the contract was abandoned by the ONGC hence the contractor was entitled to claim compensation for breach of contract. Abandonment is nothing but breach of contract. If the contractor alleged abandonment of contract on the part of the appellant and raised specific

claim of Rs.33,425/- on this count the umpire should have indicated whether it was a case of abandonment of contract or breach of contract. Of course detailed reasons for such conclusion need not have been given by the umpire. If this was not done the lumpsum award becomes invalid, because from plain reading of the award it cannot be said that the plea of abandonment of contract by the appellant ONGC or committing breach of contract by the appellant, was accepted by the Umpire. If head-wise claim would have been examined certainly it could have been said that the umpire was satisfied that it was a case of abandonment of contract by the ONGC or breach of contract committed by the ONGC and in that event we could not have further examined whether it was actually breach of contract or abandonment of contract by the appellant. If clause (14) of the Arbitration Agreement was not taken into account by the Umpire it can be said that the Umpire misconducted with the proceeding because he proceeded totally against clause (14) of the Arbitration Agreement.

21. Shri Mehta pointed out in the course of argument that prima facie it was not a case of abandonment of contract by the ONGC and he had drawn our attention to a letter dated 17.3.1977 on record wherein the ONGC requested the contractor to start work, but he refused to start the work. Thus, the material on record prima facie shows that it was not a case of breach of contract or abandonment of the contract by the ONGC. If this was so then specific prohibition in clause (14) of the Arbitration Agreement that no compensation by way of claim is admissible, but only extention of time limit could be granted will render the award suffering from manifest error on record. If the record including the arbitration agreement would have been carefully examined by the umpire we are sure he would not have rendered Award granting compensation on any ground whatsoever to the contractor. Since this was not done it not only amounts to error manifest on the record, but also misconduct with the arbitration proceedings. If the umpire without carefully going through the agreement between the parties proceeded to decide the claim of the contractor it could be said that he acted without jurisdiction and also his act amounts to misconduct with arbitration proceedings. It also amounts to jurisdictional error on the part of the umpire inasmuch as in face of clause (14), he had no jurisdiction to award any compensation to the contractor. The objection raised by Shri Mehta on this ground finds support from the pronouncement of the Apex Court in ASSOCIATED ENGINEERING In ASSOCIATED ENGINEERING CO. V/S.

GOVERNMENT OF ANDHRA PRADESH, AIR 1992 SC 232 where the Apex Court held that where the Arbitrator granted claim not covered by the Agreement it amounts to error apparent on the face of the record. It was further observed that the conclusion reached by the Arbitrator, not by interpreting contract, but by merely looking at it is no conclusion and as such the Arbitrator can be said to have misdirected and misconducted himself which in turn amounts to jurisdictional error which calls for setting aside of such award. The Apex Court further proceeded to observe that the Arbitrator can not act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

22. In the case before us it seems from the Award that the umpire has over looked the Arbitration Agreement, especially clauses 14 & 18 of the Agreement and as such in the light of Apex Court's verdict aforesaid it can be said that there is jurisdictional error on the part of the umpire, which are apparent on the face of the Award and further that the conclusion was reached by the Umpire not by interpreting the contract but by totally over looking it.

23. The contention of Shri Mehta that the Umpire could not have travelled beyond the Agreement between the parties further finds support from the Apex Court's verdict in NEW INDIA CIVIL ERECTORS (P) LTD. V/S. OIL AND NATURAL GAS CORPORATION, reported in AIR 1997 SC 980 (at page : 982), where it was laid down that it is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he can not award any amount which is ruled out or prohibited by the terms of the agreement.

24. This takes us to the consideration of clause (18) of the Arbitration Agreement, which is the third objection of Shri Mehta that in face of this clause the Arbitrator could not have awarded any interest. Clause

18 of the Arbitration agreement reads as under :

"18. INTEREST ON AMOUNTS

No interest will be payable on the Security Deposit or any other amount payable to the CONTRACTOR under the contract."

25. Shri Mehta has rightly argued that no interest under this clause is payable to the contractor either on the security deposit or on any other amount payable to the contractor. He has rightly interpreted the word "amount payable to the contractor". In view of this specific provision the Umpire travelled beyond his jurisdiction and also beyond the terms of Agreement between the parties in awarding interest to the contractor. This also amounts to procedural misconduct on the part of the umpire.

26. Shri Mehta has drawn our attention in the last to the letters dated 2.8.1983 and 26.10.1983 from the ONGC to the contractor and argued that the contractor was requested on receipt of material to start reconditioning work, but the contractor refused to commence the work as per his letter dated 17.11.1983 and in this way there was no abandonment of contract by the ONGC.

27. For the reasons stated above we are of the view that in the first place the umpire has misconducted with the proceeding, in the second place there is error apparent on the face of the record inasmuch as the Umpire has over-looked clauses 14 & 18 of the Arbitration Agreement, thirdly that the umpire has travelled beyond the scope of the contract between the parties empowering him to decide the disputes between the parties on certain items and claims and lastly that he has rendered lumpsum award making it totally unintelligible. As such within the ambit of Section 30(a) of the Arbitration Act the Award is liable to be set aside.

28. The Appeal, therefore, succeeds and is hereby allowed with no order as to costs. The Judgment and Decree under Appeal are hereby set aside. The Award dated 3.5.1985 rendered and signed by the Umpire is hereby set aside.

sd/-

(D. C. Srivastava, J.)

Date : July 11, 2000 sd/-

(H. K. Rathod,)

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